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IN THE

Supreme Court of the United States

OCTOBER TERM 1960

No. 228

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA, and MARKET PHARMACY COMPANY, INC., *Petitioners,*

v.

THEODORE BRITTON, Deputy Commissioner, District of Columbia Compensation District, Bureau of Employees' Compensation, United States Department of Labor, and EVELYN MORTON, individually and as mother and next friend of SHIRLEY ANN HARRIS MORTON, and PEARLINE MORTON, minor children, *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOHN FLATHER ELLIS
Counsel for Petitioners
1319 F Street, N.W.
Washington 4, D. C.

July 12, 1961

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STATUTE INVOLVED

Longshoremen's and Harbor Workers' Compensation Act (Act. Mar. 4, 1927, ch. 509, 44 Stat. 1424, as amended, 33 U.S.C. sec. 901 et seq. 3

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v.

THEODORE BRITTON, Deputy Commissioner, District of Columbia Compensation District, Bureau of Employees' Compensation, United States Department of Labor, and EVELYN MORTON, individually and as mother and next friend of SHIRLEY ANN HARRIS MORTON, and PEARLINE MORTON, minor children, *Respondents*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

National Union Fire Insurance Company of Pittsburgh, Pennsylvania, and Market Pharmacy Company, Inc., the petitioners herein, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above case on March 23, 1961.

OPINIONS BELOW

The opinion and order of the Circuit Court of Appeals for the District of Columbia Circuit is unreported and is printed in Appendix A hereto, infra, page 19a. The order of the United States District Court for the District of Columbia is printed in Appendix A hereto, infra, at page 2a and the opinion of that court is printed in Appendix A hereto, infra, at page 3a. The Compensation Order and Award of Death Benefits made by Respondent Britton, the deputy commissioner, is printed in Appendix A hereto, infra, at page 12a.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 23, 1961 (infra, App. A, p. 19a). Rehearing was denied on April 13, 1961 (infra, App. A, p. 1a). The jurisdiction of the Court is invoked under Section 1254(1) of Title 28 of the United States Code.

QUESTION PRESENTED

The question presented for the consideration of the Court is whether the Court of Appeals erred in sustaining the District Court's decision that the deputy commissioner had properly found that a valid common law marriage existed between Respondent Evelyn Morton and the deceased employee at the time of the latter's injury and resulting death on the basis that such finding does not lack support by substantial evidence on the record considered as a whole when that record contains a finding by the deputy commissioner entirely inconsistent with the existence of a common law marriage, also contains other undisputed evidence showing that Respondent Evelyn Morton had denied that the deceased employee was the father of either of her two children, the "substantial evidence" involved was evidence of cohabitation and reputation, and the question before the

Court of Appeals was whether the finding that a common law marriage existed was correct in law.

STATUTE INVOLVED

Longshoremen's and Harbor Workers' Compensation Act (Act Mar. 4, 1927, ch. 509, 44 Stat. 1424, as amended, 33 U.S.C., Sec. 901, et seq.)

Sec. 902, Definitions.

* * * * * * *

"(16) The term 'widow' includes only the decedent's wife living with or dependent for support upon him at the time of his death; or living apart for justifiable cause or by reason of his desertion at such time.

* * * * * * *

Sec. 921, Review of compensation orders.

* * * * * * *

"(b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or the United States District Court for the District of Columbia if the injury occurred in the District.)"

STATEMENT

John P. Morton, an employee of the Market Pharmacy was injured in the scope of employment on July 2, 1958, and died as a result of his injuries on July 15, 1958 (infra, App. A, pp. 1a-2a). Subsequently, Respondent Evelyn Morton made a claim against the employer for death benefits under the Longshoremen's and Harbor Workers' Compensation Act, supra, as made applicable in the District of Columbia (infra, App. A, p. 14a), and a hearing was held at which among other things, the existence of a marital relationship between Evelyn Morton and the deceased employee was

contested (infra, App. A, p. 4a). At the hearing there was introduced evidence of cohabitation and reputation as to the existence of a common law marriage (JA 90, 104, 107, 108, 115). Evidence also was introduced tending to controvert such claim and Respondent Evelyn Morton, then claimant, was cross examined and testified directly concerning such evidence (JA 91-104). Her own testimony is that she and deceased commenced living together in Charlottesville, Virginia, in 1941, and that while so doing they entered into a private agreement to consider themselves husband and wife (JA 92-93, 102). In about 1943 or 1944, they moved to the District of Columbia, where, as was found by the deputy commissioner;

> "* * * some time between the conception and birth of Shirley Ann Harris Morton the mother of Evelyn Morton, Pearl Henrietta Harris, asked the employee and Evelyn Morton to allow her to adopt the expected child, and this request was joined in by one Crawley Rogers with whom the said Pearl Henrietta Harris was then living; that when the child was born the said Evelyn Morton had it registered with the vital statistics authority as the child of Crawley Rogers and Evelyn H. Harris, her own maiden name * * *" (infra, App. A, p. 16a).

That child was born on June 18, 1946, in the District of Columbia (JA 94). Shortly thereafter, Respondent Evelyn Morton (hereafter referred to as Evelyn) testified, she and deceased moved from the District to Maryland (JA 95). While in Maryland, she filed a supplemental birth affidavit naming the child born to herself and Crawley Rogers as Shirley Ann Harris, reiterating that her own surname was Harris (JA 103). Nothing in the record indicates that the name of that child ever was changed to Morton. After residing in Maryland for some five years, Evelyn testified that she and deceased returned to the District of Columbia (JA 96), for two years after which they returned to Maryland (JA 96), where Evelyn continues to reside (JA 91).

In 1952, Evelyn had told the public authorities in Maryland that she had no one to help her with her bills (JA 101, 135, 138). After returning to Maryland in 1954, she applied for public assistance giving the surname of her first child as Harris (JA 134, 137). In 1956, she did not know where deceased was living (JA 96). On occasion, she has denied that her other child was fathered by the deceased employee (JA 104).

REASONS FOR GRANTING THIS WRIT

The finding that a common law marriage existed violates the rule laid down by this Court in Travers v. Reinhardt, 205 U.S. 423, 51 L. ed. 871, 27 S. Ct. 567, that the parties must live together "constantly and openly," "holding forth to the world" that they are husband and wife.

One of the deputy commissioner's findings of fact, that the parties to the alleged marriage agreed that their first child was to be considered the child of another man and the action of Evelyn in subsequently registering that child as the child of that other man and herself as Evelyn Harris rather than Evelyn Morton, is a complete public disavowal of any marital relationship between the parties hereto. A fundamental consideration in this Court's decision in *Travers* v. *Reinhardt*, supra, was the uniform openness and consistency of the relationship between the parties (205 U.S. 442). Therefor, the finding in the present case by the deputy commissioner that, in connection with the birth of Evelyn's first child, the parties denied the existence of any marital relationship between them shows that his finding that such a relationship existed is an error of law.

Further, an analysis of the evidence, viewed in the light most favorable to Evelyn, shows that, under the law of the various jurisdictions where the parties to the present relationship lived from time to time, no marital relationship could have come into being between them.

Here, the parties commenced living together in Virginia. Although the evidence shows that while so doing, they entered into an agreement to be husband and wife, no common law marriage could be established in that state (Code of Virginia, 1950, Title 20, Section 13, as construed in *Offield* v. *Davis*, 100 Va. 250, 40 S.E. 910; see also this Court's recognition of that case in the *Travers* case, supra, 205 U.S. at p. 423). Some time later, they moved to the District of Columbia, a jurisdiction recognizing common law marriages under the *Travers* case, supra, where, if the testimony of Evelyn is credible, the deceased fathered her first child. But the findings of the deputy commissioner and her testimony also show that she and deceased determined to and she, in fact, did renounce any idea that they were married and to have that child registered as the child of an unmarried mother by another man. The child was so named and at the time of doing so Evelyn admitted publicly that she was not married.

As there was a public disavowal of any marital relationship at that time, the requirement of the *Travers* case, supra, that the parties hold forth to the world that they were married, was violated. Their action, particularly that of Evelyn shows that any relationship between them at that time was meretricious (C.J.S, Marriage, Vol. 55, sec. 7, p. 819). Shortly after the birth of Evelyn's first child, Evelyn's testimony shows that the parties moved to Maryland. No common law marriage could be established in that state (*Travers* v. *Reinhardt*, supra; *Jackson* v. *Jackson*, 82 Md. 17, 33 A. 317; *Milton* v. *Escue*, 201 Md. 190, 93 A. 2d 258). While in Maryland, some three years after the birth of the first child, Evelyn filed a supplemental birth affidavit giving that child the surname of "Harris," her own name and reiterating that the father was another man than deceased. Thereafter, in 1952, she stated to Maryland welfare authorities that she had no one to help her with her bills. Therefore, under the rule of the *Travers* case,

supra, no common law marital relationship could have been evolved up to this time.

There is testimony that after the return to the District of Columbia in 1952, they held themselves out as man and wife by cohabitation and reputation (JA 107). But it takes something more than mere words to change a meretricious relationship into a marriage (C.J.S., Marriage, supra, at p. 855, *Hendrich* v. *Anderson*, C.A. Utah, 191 F. 2d 242). There is no evidence whatsoever that these parties took any action whatsoever to more firmly cement their relationship and it is apparent from Evelyn's actions after returning to Maryland two years later that the informality of their relationship was expected to continue, that in 1956 she did not know where deceased was located and gave evidence that, during that period, she and deceased agreed to and did separate and she did not know where he was (JA 96). She also has admitted disclaiming that deceased was the father of her other child (JA 104). Her actions cannot be considered to meet the requirements of *Travers*, supra, that the parties must live together constantly and in good faith, holding forth to the world, without exception that they are husband and wife. Rather, her actions are those of one who will claim such a relationship only when it appears to be to her advantage to do so, a far cry from the requirements of our Scottish ancestors which formed the basis for this Court's decision in *Travers* (which see), that despite the non-existence of permissibility of a common law marriage in the English law at the time this country became independent, a common law marriage was permitted under Scottish law under rather strict conditions.

The court below held that the deputy commissioner's finding that a common law marriage relationship existed was conclusive because based on "substantial evidence" (infra, App. A, p. 20a). The District Court found that despite "false statements of a serious and grave nature * * * with respect to the matters in issue" the deputy com-

missioner properly found that a common law marriage existed (infra, App. A, pp. 10a-11a). However, this Court, in *Crowell* v. *Benson*, 285 U.S. 22, 76 L. ed. 598, 52 S. Ct. 285, has pointed out that the deputy commissioner's determination of facts is not conclusive where their existence is a condition precedent to the operation of the statute and that the power of the Congress to enact the legislation turns on the existence of these conditions.

By its own terms, the Act here involved requires that one claiming widow's benefits under its provisions must first have met the legal definition of the word "wife" (33 U.S.C. 902(16)). This Court, in construing the statute here involved, pointed out that such terms must be given their broad and more usual concept in *Lawson* v. *Suwanee Fruit & S.S. Co.*, 336 U.S. 198, 93 L. ed. 614, 69 S. Ct. 504, and reaffirmed that position in *Farmers Irrigation Co.* v. *McComb*, 337 U.S. 764, 93 L. ed. 1681, 69 S. Ct. 1297, stating that "* * * we have * * * consistently refused to pervert the process of interpretation by mechanically applying definitions in unintended contexts." It is submitted that even the most cursory reading of the opinion of the court below and of the District Court makes it evident that both those courts mechanically applied the definition here involved although, as was pointed out by this Court in *Crowell* v. *Benson*, supra, their existence is a condition precedent to the operation of the statute.

CONCLUSION

There is a long-standing rule of law, based on the decision of this Court in the *Travers* case, supra, that where "it is sought to raise a presumption of marriage from reputation coupled with cohabitation, the reputation must be general and not divided * * *" (C.J.S., Marriage, vol. 55, sec. 43, p. 890). In the present case, there was a clear finding by the deputy commissioner that the reputation was divided, as shown by his outright finding that, at the time of the

birth of the first of Evelyn's children, both she and the deceased denied the existence of such a relationship. Under the *Travers* rule, no common law marriage could have come into existence under the undisputed facts here involved. The existence of a person meeting the legal definition of the word "wife" was necessary under the decisions of this Court in *Suwanee Steamship* and in *Farmers Irrigation*, supra, and the decision of the court below that the "substantial evidence" rule was applicable clearly was in error. Accordingly that court erred in denying the appeal of petitioners.

JOHN FLATHER ELLIS
Counsel for Petitioners
1319 F Street, N.W.
Washington 4, D. C.

July 12, 1961

APPENDIX

APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,061

September Term, 19—

Filed April 13, 1961 — Joseph W. Stewart, Clerk

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, a corporation, et al., APPELLANTS,

v.

THEODORE BRITTON, Deputy Commissioner, District of Columbia Compensation District, Bureau of Employees Compensation, U. S. Department of Labor, et al., APPELLEES.

Before: EDGERTON, DANAHER and BASTIAN, *Circuit Judges, in Chambers.*

ORDER

Upon consideration of appellants' petition for rehearing, it is

ORDERED by the court that the petition for rehearing is denied.

PER CURIAM.

Dated: April 13, 1961.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 544-60

Filed October 6, 1960—Harry M. Hull, Clerk

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH and MARKET PHARMACY COMPANY, INC., PLAINTIFFS,

v.

THEODORE BRITTON, Deputy Commissioner, Bureau of Employees Compensation, DEFENDANT,

and

EVELYN MORTON, individually and as mother and next friend of SHIRLEY ANN HARRIS MORTON and PEARLINE MORTON, minor children, DEFENDANTS-INTERVENORS.

ORDER GRANTING SUMMARY JUDGMENT

This action came on to be heard upon the respective motions for summary judgment of plaintiffs, defendant Theodore Britton, Deputy Commissioner, Bureau of Employees Compensation, and defendants-intervenors Evelyn Morton, individually and as mother and next friend of Shirley Ann Harris Morton and Pearline Morton, minor children, and the Court having found that there is no genuine issue as to any material fact and having filed its decision herein upon the 26th day of September, 1960, and having concluded that said defendant and defendants-intervenors are entitled to judgment as a matter of law, it is this 6th day of October, 1960

ORDERED that the motion of plaintiffs for summary judgment be and the same hereby is denied, and it is further

ORDERED that the motion for summary judgment of defendant, Theodore Britton, Deputy Commissioner, Bureau of Employees Compensation, be and the same hereby is granted, and it is further

ORDERED that the motion for summary judgment of defendants-intervenors, Evelyn Morton, individually and as mother and next friend of Shirley Ann Harris Morton and Pearline Morton, minor children, be and the same is hereby granted, and the action be and the same hereby is dismissed with prejudice.

s/ ALEXANDER HOLTZOFF,
United States District Judge

Certificate of Service

I hereby certify that service of the foregoing proposed Order Granting Summary Judgment was made this 4th day of October, 1960, upon each of the following:

Messrs. E. Willard Hyde and John Flather Ellis, Attorneys for Plaintiffs, 1319 F Street, N.W., Washington 4, D. C.

Saul M. Schwartzbach, Esq., Attorney for Defendants-Intervenors, 1109 Woodward Building, Washington 5, D. C.

s/ ELLEN LEE PARK,
Assistant United States Attorney, Attorney for Defendant, Theodore Britton, Deputy Commissioner, Bureau of Employees Compensation

OPINION

Filed September 26, 1961 – Harry M. Hull, Clerk

John Flather Ellis, of Washington, D. C., for the plaintiffs.

Oliver Gasch, United States Attorney; *John F. Doyle* and *Ellen Lee Park*, Assistant United States Attorneys; and *Herbert P. Miller*, Assistant Solicitor, Department of Labor; all of Washington, D. C., for the defendant.

Saul M. Schwartzbach, of Washington, D. C., for Evelyn Morton et al., for defendants-intervenors.

This is an action to review and set aside awards made under the Longshoremen's and Harbor Workers' Compensation Act, which has been adopted as the Workmen's Compensation Act of the District of Columbia.[1] As prescribed by statute, the action is brought by the insurance carrier and the employer against the Deputy Commissioner of the Bureau of Employees Compensation of the Department of Labor, who rendered the decision.[2] The beneficiaries of the awards, which were made for the death of an employee, have intervened as additional party defendants. The matter is before the Court at this time on cross-motions for summary judgment. This Court recently had occasion to recapitulate the principles governing the scope of judicial review of workmen's compensation orders in *Great American Indemnity Co., et al.* v. *Britton*, decided September 20, 1960, —— F. Supp. ——, and they need not be reiterated. There are two controverted issues in this case at this juncture: first, whether the injuries sustained by the deceased were connected with his employment, i.e., did they arise out of and in the course of, or because of the employment; and, second, whether the principal claimant is the lawful widow of the deceased on the basis of an alleged common law marriage.

The essential facts involving the manner in which the deceased was killed are not controverted. What is in dispute are the inferences to be drawn from the evidence. The de-

---

[1] 33 U.S.C. § 901 *et seq.*; D.C. Code [1951] 36:501.
[2] 33 U.S.C. § 921(b).

ceased, John P. Morton, was an employee at a drug store known as "The Market Pharmacy," located on 7th Street in downtown Washington. He served as a cook and the manager of the lunch counter. On the night of July 2, 1958 a customer named Brown came into the store and asked for a sandwich. After being served and making payment, he claimed that the sandwich was not satisfactory and asked for a refund. When his request was denied, Brown left, but shortly thereafter he returned and repeated his demand. At that time his money was repaid him. Nevertheless, Brown failed to depart from the premises, but lingered in the store for no apparent reason. The deceased asked Brown to leave but the latter declined to do so. The deceased then procured a knife, which he held in one hand, approached Brown, slapped him with his other hand, and ejected him from the premises. Brown thereupon obtained a pistol or a revolver and waited in the street outside of the store, apparently with the purpose of waylaying the deceased. The deceased, after completing his work for the night, left the store and as he started to walk down the street, Brown fatally shot him.

Manifestly, the deceased was not justified in brandishing a knife and assaulting Brown. He had not been menaced or threatened and no element of self defense was involved. If Brown refused to leave the premises on request, the proper course for the deceased or his employer to pursue would have been to call the police. Nevertheless, Morton's misconduct does not dispose of the case. If, in the course of the performance of his duties, or in protecting the property of his employer, the employee uses excessive force as the result of bad judgment or recklessness on his part, this circumstance does not deprive him of the benefits of the Workmen's Compensation Act. On the other hand, if the employee is injured as a result solely of an act on his part committed with a wilful intention to injure or kill another, no compensation is payable. 33 U.S.C. § 903(b). When Brown

killed the deceased, he, too, was not exercising any right of self defense. Brown waited for the deceased to leave his place of employment and then attacked him. In other words, the earlier altercation between the deceased and Brown is a circumstance to be weighed and considered together with the remaining facts, but does not alone determine the issues.

In its ultimate analysis the question is whether on one hand the injury arose out of and in the course of the employment, or was caused by the wilful act of a third person directed against the employee because of his employment;[3] or whether, on the other hand, it was sustained in a personal quarrel or conflict independent of the employment. The evidence in this case is susceptible of either of two inferences: first, that in the course of his employment and in the performance of his duties as an employee, the deceased ejected Brown and the latter shot him in revenge; and, second, that the original altercation between the deceased and Brown was entirely personal and not connected with the employment of the deceased, and that this quarrel culminated in the shooting. It was the function of the trier of the facts, in this instance the Deputy Commissioner, to determine which of the two inferences should be drawn. He made the first deduction, as he had a right to do. Whether the Court would have reached the same conclusion is immaterial. The finding of the Commissioner on this point is supported by substantial evidence, even though there may be countervailing evidence on the other side. If either of two possible inferences may reasonably be drawn from the evidence, the decision as to which deduction should be made rests finally with the Deputy Commissioner. Such a finding of fact may not be set aside by the reviewing tribunal, *Del Vecchio* v. *Bowers*, 296 U.S. 280, 286-7. Consequently, the conclusion of the Deputy Commissioner that the death of the deceased is within the coverage of the Workmen's Compensation Act, may not be disturbed by the Court.

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[3] 33 U.S.C. § 902(2).

Both on the law and the facts, the case at bar is similar to *Appleford* v. *Kimmel*, 297 Mich. 8, 296 N.W. 861. There a theater usher evicted a disturber. On his way home the usher was assaulted by the person whom he had ejected. It was held that the injury sustained by him arose out of and in the course of the employment and, therefore, was covered by the Workmen's Compensation law.

The next major question involved in this controversy is whether the principal claimant is the widow of the deceased. She contends that she was his wife by a common law marriage, and the Deputy Commissioner so found. That she and the deceased lived together for many years is not disputed. The question is whether their relation was meretricious, or that of a common law marriage.

The words "common law marriage" have at times been used somewhat loosely and, therefore, it seems appropriate to revert to a definition of the term. A marriage may be contracted in either of two ways: either by a ceremony witnessed by a minister of religion or by a civil officer authorized by law to do so, in which event it is denominated a ceremonial marriage; or by an agreement between a man and a woman to marry each other and to become husband and wife, as of the time of the consent, in which event the marriage is known as a common law marriage. Both types of marriages are equally lawful, solemn, and binding. In order to constitute a common law marriage, however, each of the two spouses must intend to enter into a permanent relation of husband and wife, and each must expressly covenant with the other to do so as of the time of the agreement. Nothing less will suffice. Moreover, such an agreement must be followed by cohabitation. Cohabitation, even though continued and prolonged, without an express agreement to enter into a permanent married state *in praesenti* would lead to the conclusion that the relation is a meretricious one, irrespective of reputation. Like any other fact, existence of the agreement to become husband and wife *in praesenti*,

may be established either by direct or by circumstantial evidence. A conclusion of law that a common law marriage was entered into and existed, may be predicated solely on a finding of fact based on circumstantial evidence that such an express agreement was made by the two spouses and was followed by cohabitation.

One of the latest and clearest statements of the law on this subject is found in the opinion of Judge Miller, in *United States Fidelity & Guaranty Co.* v. *Britton*, 106 U.S. App. D.C. 58, 60-61, where the learned judge wrote as follows:

> "... when a man and woman who are legally capable of entering into the marriage relation mutually agree, in words of the present tense, to be husband and wife, and consummate their agreement by cohabiting as husband and wife, a common law marriage results.
>
> "Thus, this court has followed the general rule that it is essential to the validity of a common-law marriage that parties legally capable of entering into that relationship mutually consent or agree to do so, but has added another essential,—that the agreement must be consummated by cohabitation if it is to result in a marriage."
>
> • • • •
>
> "... when one of the parties to the alleged marriage asserts its existence but either denies or fails to say there was mutual consent or agreement, then mere cohabitation, even though followed by reputation, will not justify an inference of mutual consent or agreement to be married."

This discussion brings us to a consideration of the evidence on this point. Testimony was adduced, not only by the alleged widow, but also by other witnesses, that Morton, the deceased and the claimant, whose maiden name was Evelyn Harris, commenced living together in Charlottesville, Virginia, in 1942. She testified: "I thought we was married ... because he said he was my husband, and I said I was his wife; so I just figured we was married." The

Deputy Commissioner believed this testimony, as he had a right to do, for he saw and observed the witness. These expressions, in effect, constituted a mutual agreement in words of the present tense to be husband and wife. Obviously, no set formula is required for this purpose, so long as the exchange of words inescapably and unambiguously implies that an agreement was being entered into to become man and wife as of the time of the mutual consent.

Virginia, however, does not recognize common law marriages. *Offield* v. *Davis*, 40 S.E. 910, 100 Va. 250, 263. Consequently the agreement to become husband and wife was not effective, when made, since the Virginia law created an impediment to the creation of such a marriage relation. In 1946 the couple moved to Washington, where they continued living together for about ten years. The District of Columbia recognizes common law marriages. Consequently, the impediment to the inception of the marriage was removed and since the relation continued pursuant to the agreement entered into previously, a common law marriage was created as soon as the couple moved to the District of Columbia and continued living there.

This precise situation was presented in *Travers* v. *Reinhardt*, 205 U.S. 423, 436-440. In that case the couple proposed to enter into a common law marriage in Virginia. As the State of Virginia did not recognize such marriages, this contractual relation was not valid. Later the couple moved to Maryland, which likewise did not recognize common law marriages. Subsequently, they took up residence in New Jersey, where they continued their cohabitation as husband and wife. New Jersey recognizes common law marriages. The Supreme Court held that when the couple came into a State which sanctioned it, a valid common law marriage came into being.

The testimony of the claimant on this issue was corroborated by other witnesses tending to show that the deceased held the claimant out as his wife by introducing her

as such on various occasions; by taking out insurance policies in which he named her as his spouse; and by joining with her in executing a promissory note and a chattel mortgage. The policies, the note, and the chattel mortgage were introduced in evidence. Moreover, there was evidence on the part of a landlady, who appeared to be entirely disinterested, that mail was received by the claimant in which she was addressed as Mrs. Evelyn Morton.

Counsel for the plaintiffs stressed the fact that from 1956 until Morton's death in 1958, the parties lived apart, he in a room close to his work, and she and her two children with her mother in Maryland. The fact that a married couple separates obviously does not affect the validity of the prior marriage and, consequently, this circumstance appears irrelevant. Moreover, there was testimony showing that the parties lived in this manner for the last two years of Morton's life for economic reasons; that they met each other once or twice a week and spent the night together; and that the deceased regularly sent money to the claimant.

There is, however, an unsavory aspect to the claimant's testimony. If her testimony was true, she had made false statements of a serious and grave nature in the course of her life in respect to the matters in issue, and even obtained public assistance from Maryland authorities by an outrageous falsehood. She explained these misstatements, however, to the satisfaction of the Deputy Commissioner. Whether the Court would have been satisfied with the explanation is manifestly immaterial. The credibility of the witness and the weight of the evidence was for the Deputy Commissioner to determine and he resolved them in her favor.

The situation presented here radically differs from that confronted in *United States Fidelity and Guaranty Co.* v. *Britton*, *supra*, which has been previously discussed. In the last mentioned case the alleged wife had expressly rejected the idea of marrying the man with whom she was living,

pointing to the fact that she was already married to another. After this impediment was removed by the death of her husband, no agreement was made by her with her paramour to become husband and wife. In the case at bar, the cohabitation was accompanied by an express agreement to be husband and wife *in praesenti*.

In the light of the foregoing considerations, the awards must be sustained.

The plaintiffs' motion for summary judgment is denied, and the defendant's motion for summary judgment is granted.

s/ ALEXANDER HOLTZOFF,
United States District Judge.

September 26, 1960.

UNITED STATES DEPARTMENT OF LABOR
Bureau of Employees' Compensation
District of Columbia Compensation District

Filed February 24, 1960—Harry M. Hull, Clerk

In the matter of the claim for compensation under the District of Columbia Workmen's Compensation Act
(John P. Morton, deceased employee)

EVELYN MORTON, widow; SHIRLEY ANN HARRIS and PEARLINE MORTON, minor children, CLAIMANTS,

v.

MARKET PHARMACY COMPANY, INC., EMPLOYER,
NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA., INSURANCE CARRIER.

COMPENSATION ORDER

AWARD OF DEATH BENEFITS

Case No. 801-14 Fatal

Such investigation in respect to the above-entitled claim having been made as is considered necessary, and hearings having been duly held in conformity with law, the Deputy Commissioner makes the following

FINDINGS OF FACT

That on July 2, 1958, and for some time prior thereto, John P. Morton, hereinafter referred to as "employee," was in the employ of the employer above named, whose address was 1430 7th Street, Northwest, Washington, District of Columbia; that the employer was subject to the provi-

sions of an Act of Congress approved May 17, 1928, entitled, "An Act to provide compensation for disability or death resulting from injury to employees in certain employments in the District of Columbia, and for other purposes"; that the liability of the employer for compensation under the said Act was insured by the National Union Fire Insurance Company of Pittsburgh, Pa.

That on the said day the employee herein, while leaving the employer's place of business after completing his work duties for the day, sustained a gunshot wound of the abdomen.

That the employment of the employee by the employer was as manager of its soda fountain and lunch counter and as short order cook.

That on July 2, 1958, the employee while in the performance of the duties of the employment, became involved in an argument with one of the employer's customers concerning a sandwich which had been served to the said customer in the employer's place of business; that the said customer demanded that the money he had paid for the sandwich be returned to him and the employee refused to comply with this request; that the customer left the employer's place of business, but that he returned in a short time and the money he had paid for the sandwich was returned to him by another employee of the employer; that thereafter the said customer remained on the employer's premises and renewed the argument with the employee; that when the said customer refused to leave the employer's place of business upon the request of the employee, the employee, who had a knife in one of his hands, struck the customer with his other hand and forced the customer to leave; that thereafter the customer, who had a gun in his possession, waited near the employer's place of business until the employee finished his work duties in the employment and as the employee was leaving the employer's premises the said customer inflicted the gunshot wound suffered by the employee as found

above; that the argument between the employee and the employer's customer, which argument culminated in the employee's injury, arose out of and in the course of the employee's employment by the employer; that the said gunshot wound suffered by the employee was willfully inflicted upon him by the employer's customer because of his employment; that the said gunshot wound suffered by the employee arose out of and in the course of the employment.

That written notice of the injury was not given to the employer within thirty days, but that the employer had knowledge of the injury and has not been prejudiced by the lack of such written notice;

That as a result of the injury the employee required medical and surgical treatment and hospital care; that the employer and the insurance carrier are liable for the reasonable cost of such treatment and care.

That the average weekly wages of the employee herein at the time of the injury were $70.

That as a result of the injury the employee was wholly disabled from July 2, 1958, to July 14, 1958, inclusive, 1-6 7 weeks, and for such temporary total disability, less the first three days, he was entitled to compensation at the rate of $46.67 per week (66-2 3 per cent of $70) from July 5, 1958, to July 14, 1958, inclusive, 1-3 7 weeks in the amount of $66.67.

That the employee died on July 15, 1958, as a result of the injury.

That the employee's death arose out of and in the course of the employment.

That written notice of the employee's death was not given to the employer within thirty days, but that the employer had knowledge of the death of the employee and has not been prejudiced by the lack of such written notice.

That on October 1, 1958, Evelyn Morton, whose maiden name was Evelyn Henrietta Harris, and who was born on

April 26, 1924, filed claim against the employer for death benefits under the District of Columbia Workmen's Compensation Act in her own behalf and in behalf of her two minor children, Shirley Ann Harris Morton, who was born on June 18, 1946, and Pearline Morton, who born on December 28, 1948, alleging that she is the surviving wife of the employee and that the said children are the surviving minor children of the employee.

That in 1941 or 1942 the employee and the said Evelyn Morton after having lived together for some time in the State of Virginia, came to Washington, D. C., and took up residence in that city as husband and wife; that the employee told the said Evelyn Morton that she was his wife and that he was her husband; that the said Evelyn Morton, who has a fourth grade education, agreed with the employee's statement concerning the existence of a marital relationship between them; that after the employee and the said Evelyn Morton took up residence in Washington, D. C., they continued to reside there for the most part until the employee's death; that the employee and the said Evelyn Morton held themselves out to their families and friends and to the public as husband and wife, and they were considered as such by all of their acquaintances; that they rented living quarters at various places and contracted obligations for family expenses as husband and wife; that they lived together under the same roof with the exception of two periods, a short time when they were both unable to work by reason of illness and dependent upon their respective relatives for the necessities of life, and another period when the employee rented a room apart from his family in order to be near the business establishment of the employer herein; that during the period when he rented a room, as found above, the employee spent one or more nights each week with the said Evelyn Morton in the home of her mother with whom she lived, and Evelyn Morton spent one or more nights a week with the employee in the room he

rented near the employer's place of business and they continued to cohabit as husband and wife.

That the said Evelyn Morton is the surviving common law wife of the employee; that as such she is entitled to death benefits at the rate of $24.50 per week (35 per cent of $70) beginning July 15, 1958, and continuing subject to the limitations of the Act.

That Shirley Ann Harris Morton, born on June 18, 1946, and Pearline Morton, born on December 28, 1948, are the children of the employee and Evelyn Morton; that the employee and Evelyn Morton were living together and cohabiting as husband and wife when the said children were conceived and born; that some time between the conception and the birth of Shirley Ann Harris Morton the mother of Evelyn Morton, Pearl Henrietta Harris, asked the employee and Evelyn Morton to allow her to adopt the expected child, and this request was joined in by one Crawley Rogers with whom the said Pearl Henrietta Harris was living; that when the said child was born the said Evelyn Morton had it registered with the vital statistics authority as the child of Crawley Rogers and Evelyn H. Harris, her own maiden name, and this was done upon the insistence of the said Crawley Rogers and Pearl Henrietta Harris; that the said Crawley Rogers died a short time after the said child's birth and the child remained with its natural parents, the employee and Evelyn Morton, and it was supported by the employee, who exercised parental control over the child and her younger sister, Pearline Morton, and who supported the children from the time they were born until the time of his death except for a period when he was ill and unable to work; that as the surviving minor children of the employee, Shirley Ann Harris Morton and Pearline Morton are entitled to death benefits at the rate of $10.50 each per week (15 per cent of $70) beginning July 15, 1958, and continuing subject to the limitations of the Act; that death benefits due the said children shall be payable to Evelyn Morton, their

mother and natural guardian; that accrued death benefits due Evelyn Morton in her own behalf at the rate of $24.50 per week and in behalf of Shirley Ann Harris Morton and Pearline Morton at the rate of $10.50 each per week, or at the combined rate of $45.50 per week from July 15, 1958, to January 25, 1960, inclusive, 80 weeks, amounts to $3,640.

That funeral services were rendered in behalf of the employee by Henry S. Washington & Sons, Undertakers, 467 N Street, N.W., Washington, D. C., the reasonable expenses of which amounted to $442.50; that the bill for such funeral expenses is outstanding; that the employer and the insurance carrier are liable for the payment of $400 as reasonable funeral expenses.

That nothing has been paid by the employer and the insurance carrier as compensation for disability or death.

Upon the foregoing findings of fact, the Deputy Commissioner makes the following

AWARD

That the employer, Market Pharmacy Company, Inc., and the insurance carrier, National Union Fire Insurance Company of Pittsburgh, Pa., shall pay death benefits to Evelyn Morton in her own behalf and in behalf of Shirley Ann Harris Morton and Pearline Morton at the combined rate of $45.50 per week, from July 15, 1958, to January 25, 1960, inclusive, 80 weeks, in the amount of $3,640, which amount is due and payable forthwith, and thereafter shall continue the payment of death benefits to Evelyn Morton in her own behalf and in behalf of Shirley Ann Harris Morton and Pearline Morton at the combined rate of $45.50, payable in biweekly installments subject to the limitations of the Act or until further order of the Deputy Commissioner.

The employer and the insurance carrier shall pay $400 as reasonable funeral expenses to Henry S. Washington & Sons.

The employer and the insurance carrier shall pay to

Evelyn Morton compensation for temporary total disability due the employee at the time of his death as follows 1-3/7 weeks at the rate of $46.67 per week from July 5, 1958, to July 14, 1958, inclusive, in the amount of $66.67, which amount is due and payable forthwith.

A fee for legal services rendered the claimants in connection with this claim is approved in favor of Saul M. Schwartzbach, Esq., in the amount of $2,500, such sum to be a lien upon and paid out of this award.

Given under my hand at Washington, D. C., this fifth day of February, 1960.

THEODORE BRITTON,
Deputy Commissioner,
District of Columbia
Compensation District.

PROOF OF SERVICE

I hereby certify that a copy of the foregoing compensation order was sent by registered mail to the claimant, the employer, the insurance carrier, the attorney for the claimant, and the attorney for the respondents, at the last known address of each as follows:

Mrs. Evelyn Morton, 6416 H Street, Cedar Heights, Maryland

Market Pharmacy Company, Inc., c/o National Union Fire Insurance Co., Suite 426, Woodward Building, Washington, D. C.

National Union Fire Insurance Company, Suite 426, Woodward Building, Washington, D. C.

Saul M. Schwartzbach, Esq., 1109 Woodward Building, Washington 5, D. C.

John Flather Ellis, Esq., Suite 711, 1319 F Street, N.W., Washington, D. C.

THEODORE BRITTON,
Deputy Commissioner.

Mailed: February 5, 1960

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16061

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, a corporation, et al., APPELLANTS

v.

THEODORE BRITTON, Deputy Commissioner, District of Columbia Compensation District, Bureau of Employees Compensation, U. S. Department of Labor, et al., APPELLEES

Appeal from the United States District Court for the District of Columbia

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Decided March 23, 1961

Mr. John Flather Ellis for appellants.

Mr. Herbert P. Miller, Assistant Solicitor, Department of Labor, with whom *Messrs. Oliver Gasch*, United States Attorney, and *Carl W. Belcher*, Assistant United States Attorney, were on the brief, for appellee Britton.

Mr. Saul M. Schwartzbach for appellees Morton.

Before EDGERTON, DANAHER and BASTIAN, *Circuit Judges*.

PER CURIAM: Appellant asked the District Court to review and set aside a compensation order awarding death

benefits to the widow and minor children of an employee who sustained a fatal injury. The Commissioner had found, *inter alia*, that after an argument arising in the course of decedent's employment in the employer's place of business between the employer's customer and the employee, a "gunshot wound suffered by the employee was willfully inflicted upon him by the employer's customer because of his employment." [1] The District Judge in granting summary judgment for the Commissioner has dealt adequately with this aspect of the case. *National Union Fire Insurance Co.* v. *Britton*, 187 F. Supp. 359 (D.D.C. 1960). It has further been argued before us that the Commissioner could not properly have found that a valid marital relationship had been established between the deceased employee and the claimant widow, and therefore the District Court had erred in sustaining the awards.

We are satisfied that the findings do not lack support by substantial evidence on the record considered as a whole.

Affirmed.

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[1] Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 902 provides that the term "injury" as used in the Act "includes an injury caused by the willful act of a third person directed against an employee because of his employment."

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 228

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, ET AL., PETITIONERS

v.

THEODORE BRITTON, DEPUTY COMMISSIONER, ETC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT DEPUTY COMMISSIONER IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court for the District of Columbia (Pet. App. 3a-11a) is reported at 187 F. Supp. 359. The *per curiam* opinion of the Court of Appeals for the District of Columbia Circuit (Pet. App. 19a-20a) is reported at 289 F. 2d. 454.

JURISDICTION

The judgment of the Court of Appeals was entered on March 23, 1961. A timely petition for rehearing was denied on April 13, 1961. The petition for a writ

of certiorari was filed July 12, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether the courts below correctly held that the finding by the Deputy Commissioner of a common law marriage between the claimant and the deceased employee was supported by substantial evidence.

STATUTE INVOLVED

Section 2 (16) of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1425, 33 U.S.C. 902 (16) provides:

> (16) The term "widow" includes only the decedent's wife living with or dependent for support upon him at the time of his death; or living apart for justifiable cause or by reason of his desertion at such time.

STATEMENT

This action was commenced by the petitioners, seeking review of a compensation order issued by the respondent, Deputy Commissioner, under the Longshoremen's and Harbor Workers' Compensation Act. The order awarded compensation benefits to Evelyn Morton. She had sought benefits as the widow of John P. Morton, who died as a result of injuries sustained in the scope of his employment in the District of Columbia.

At a hearing held before the Deputy Commissioner, the petitioners urged that the claimant was not the widow of John P. Morton within the meaning of Sec-

tion 2 (16) of the Longshoremen's and Harbor Workers' Compensation Act, *supra*, p. 2.[1]

The evidence presented on this issue during the administrative proceedings showed that in 1941 the claimant and the deceased had agreed to live as husband and wife (J.A. 92-93). After having lived together for some time in Virginia, they took up residence in the District of Columbia (J.A. 93). They held themselves out to their families and friends and to the public as husband and wife (J.A. 90, 91, 108-109, 118, 123-124), and were so considered by all of their acquaintances (J.A. 107, 118-119, 123-124). They rented living quarters at various places, contracted obligations for family expenses as husband and wife and resided together except when forced by economic necessity to reside apart (J.A. 96-98). While residing apart, they continued to treat each other as man and wife (J.A. 97, 102) and the deceased sent money to the claimant for her support (J.A. 97, 102, 118-119). The deceased procured policies of insurance wherein the claimant was variously named as spouse and beneficiary (J.A. 99-100, 121). They were the parents of two children, both of whom were supported by deceased (J.A. 91, 105, 106, 110). The Deputy Commissioner treated as falsehoods statements to the contrary made by the claimant on a birth record and to Maryland public assistance authorities (Pet. App. 10a).

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[1] Petitioners' argument directed to the question of whether the injury was suffered within the scope of employment was rejected by the courts below and has not been renewed in their petition in this Court.

On the basis of this evidence, the Deputy Commissioner found that the claimant was the surviving common law wife of the deceased and directed compensation (Pet. App. 16a). The district court affirmed the compensation order. It noted the evidence in corroboration of claimant's testimony, the cohabitation as man and wife, and the express agreement between claimant and the deceased to be husband and wife.

The court of appeals in a *per curiam* opinion (Pet. App. 19a-20a) affirmed, holding:

> "the findings do not lack support by substantial evidence on the record considered as a whole."

ARGUMENT

The courts below correctly determined that the finding of a common law marriage was supported by substantial evidence on the record as a whole. This determination turned wholly upon the particular facts of this case and, thus, presents no question of recurring importance in the administration of the Longshoremen's and Harbor Workers' Compensation Act. There is no occasion for further review.

1. While the petitioners suggest a conflict with *Travers* v. *Reinhardt*, 205 U.S. 423, the contention is based on the erroneous premise that the Deputy Commissioner found that the claimant and the deceased employee had denied the existence of a marital relationship. The Deputy Commissioner made no such finding, and there was abundant evidence to support his inference that a common law marriage had come into being under the standard set forth in *Travers*. Here, as in *Travers*, where a common law marriage

was also found, (1) there was an agreement to be husband and wife; and (2) the parties cohabited as, and held themselves out to be, husband and wife.

2. There is no greater merit to the petitioner's reliance upon *Crowell* v. *Benson*, 285 U.S. 22, for the proposition that the Deputy Commissioner's finding was not binding upon the courts below even if supported by substantial evidence. At most, *Crowell* calls for a trial *de novo* only where, unlike here, a "jurisdictional" fact is involved.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

WILLIAM H. ORRICK, JR.,
Assistant Attorney General.

ALAN S. ROSENTHAL,
STANLEY M. KOLBER,
Attorneys.

AUGUST, 1961.

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